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82-591

Nos.

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN ZERO AND EDWARD A. CINCOTTA,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

I. Whether the conduct of the prosecutor in improperly mailing a letter and an eight-page document to prospective witnesses which discouraged them from speaking to defense counsel and improperly coached them on how to present their testimony warranted the imposition of a more extreme remedy than instructions to the prospective witnesses on the morning trial began in order to safeguard the petitioners' rights to a fair trial and cross-examination and to deter further such lawlessness on the part of the government. (Copy of letter and document are contained in Appendices B and C).

II. Whether an instruction to the jury with regard to conscious avoidance of knowledge is so prejudicial as to constitute reversible error where,

(A) it fails to address the awareness of a high probability that the acts charged exist; and, (B) it fails to address an actual belief in the truth of the acts charged.

III. Whether the petitioner, Edward A. Cincotta's pervasive involvement in the lawful operations of Mystic was sufficient to permit a rational trier of fact to find, beyond a reasonable doubt, that he knew of and encouraged the conspiracy allegedly involving Mystic and others.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, John Zero and Edward A. Cincotta, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 4, 1982.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A attached hereto. No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on August 4, 1982, and this petition was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. s.1254(1) and Rule 22(2).

Statement of the Case

The petitioners, John Zero and Edward A. Cincotta, were convicted, after a jury trial in the United States District Court, District of Massachusetts (The Honorable W. Arthur Garrity, Jr.) of conspiracy to defraud the United

States in violation of 18 U.S.C. s.371 and several substantive counts of false claims and false statements in violation of 18 U.S.C. ss.287 & 1001.

The United States Court of Appeals for the First Circuit affirmed the convictions, and judgments were entered on August 4, 1982.

Four months prior to the trial of this case, the government prosecutor mailed to prospective government witnesses a letter discouraging communication with the defense and an eight page document entitled "POINTS FOR PROSPECTIVE WITNESSES (Second Version)." The trial judge denied the petitioners' motion for dismissal of the indictments and for disqualification of eleven prospective witnesses

to whom the government's letter and enclosure were addressed, and issued the following Order and Notice of Hearing:

"GARRITY, J.

Upon consideration of defendants' third motion to dismiss and supporting and opposing memoranda, and after hearing oral argument, the court reaffirms its finding in open court that government counsel improperly discouraged communication between prospective witnesses and defense counsel; and also finds that the letters to government witnesses dated September 16, 1980 and the enclosed Points for Prospective Witnesses constituted improper coaching of prospective government witnesses.

Defendants' third motion to dismiss is, however, denied insofar as it seeks outright dismissal of the indictment and disqualification of all prospective witnesses to whom the government's letters and enclosures were addressed. In the court's opinion, defendants' have not shown sufficient particularized prejudice to warrant such severe sanctions, and lesser sanctions are appropriate.

A further hearing as to the proper remedy for the prosecutorial misconduct found to have occurred is hereby scheduled for January 19, 1981 at 3:30 p.m."

On the first day of trial, and over the defendant's repeated objections, the judge instructed the witnesses on voir dire as to the proper relationship of witnesses in the judicial system in general and noted several of the

improprieties in the Government's document in particular. He later specifically advised three witnesses to reconsider their refusal to discuss the case with defense counsel, but after consulting their attorney, they still declined to confer with counsel for the defendants.

At the close of the evidence, the trial judge instructed the jury, over the petitioners' objections, as to the question of conscious avoidance of knowledge. In pertinent part, the judge instructed as follows:

"The word 'willfully' in this context means if done voluntarily and intentionally, and with the specific intent to do something that is forbidden by law, that is to say, with bad purpose either to disobey or to disregard the law.

'Knowingly' in this context means that the act or omission -- here it would be the act -- was done voluntarily and purposefully, and not because of mistake or accident.

Knowledge may be proven by a defendant's conduct and by all of the facts and circumstances surrounding the case. Furthermore, no person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

This standard implies a specific intent to avoid the proscription of the law by now determining the accuracy of one's statements. If by such conduct one participates in a scheme to defraud, that person is as guilty of violating the law as a person who is conscious of the nature of his statements."

Reasons for Granting the Writ

1. THE CONDUCT OF THE PROSECUTOR IN IMPROPERLY MAILING A LETTER AND AN EIGHT-PAGE DOCUMENT TO PROSPECTIVE WITNESSES WHICH DISCOURAGED THEM FROM SPEAKING TO DEFENSE COUNSEL AND IMPROPERLY COACHED THEM ON HOW TO PRESENT THEIR TESTIMONY WARRANTED THE IMPOSITION OF A MORE EXTREME REMEDY THAN INSTRUCTIONS TO THE PROSPECTIVE WITNESSES ON THE MORNING TRIAL BEGAN IN ORDER TO SAFEGUARD THE PETITIONERS' RIGHTS TO A FAIR TRIAL AND CROSS-EXAMINATION AND TO DETER FURTHER SUCH LAWLESSNESS ON THE PART OF THE GOVERNMENT.

The opinion of the Court below underscores the need for a definitive statement by this Court on the issue of improper communications between the government and its witnesses. It should be noted at the outset, that the practice of discouraging prospective witnesses from speaking to defense counsel, is apparently a widespread one.

The prosecuting attorney in this case received the eight page document

entitled "22 POINTS FOR PROSPECTIVE WITNESSES (SECOND VERSION)" at a course given by the Attorney General's Advocacy Institute, Department of Justice, Washington, DC, in May of 1980. The document was part of the educational materials relating to trial advocacy which were distributed to at least those in attendance, by staff members of the advocacy institute. An Assistant United States Attorney in the Southern District of New York received the document in question from another United States Attorney in that office. The Southern District of New York was one of the five United States Attorney's Offices that wrote and contributed materials to the Advocacy Institute when it began in 1974.

The Justice Department has not issued any policy statements or guidelines, or any other materials regarding

the use of this document. In the instant case, the document, together with a letter of similar import, was mailed to thirteen prospective witnesses. "The mailing conveyed the implicit and explicit message that the witnesses were partisans enlisted by the prosecution to help win its case, that the defense attorneys were adversaries who would assault their integrity, and that the prosecution if they could do so and still tell the truth." (Infra, Appendix A, page 41).

The insidious effect of this mailing on the petitioners' rights to a fair trial and cross-examination cannot be overstated. The effect on these instructions was to blunt the effectiveness of cross-examination and to deprive the petitioners of their right to a fair trial.

The trial judge found that, "the letter and document were improper for two reasons: they discouraged the witnesses from speaking to defense counsel, thereby denying the defendant's access to them, and they improperly coached the witnesses on how to present their testimony." In its analysis of the issue of prejudice, the court below concluded that, "on the question of denial of access to government witnesses, the appellants have not shown any particularized prejudice from the combination of misconduct and trial court remedy." Citing, United States v. Morrison, 449 U.S. 361 (1981). (Infra, App. pg. 42).

The instant case is clearly distinguishable from Morrison, which dealt with government interference between a defendant and his counsel.

There, the impact of such interference is readily discernible and the remedy more easily tailored to the violation. Here, however, the adverse effects of the government interference are far more subtle and difficult to access, and even more difficult to cure.[1] In Chapman v. California, 386 U.S. 18 (1967), this Court held that "before a constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt" and that the burden of proving that such error. Harrington v. California, 395 U.S. 25 (1969). Thus, the court below improperly placed the burden on the petitioners to demonstrate a particularized prejudice where the

1. For example, as to those witnesses who did speak to the defense before trial, there is no way of knowing if they were as candid as they would have been had they not received the mailing.

government should have borne the burden of demonstrating beyond a reasonable doubt that the constitutional error was harmless.

The court below also concluded that, "The only prejudice that the prosecutorial misconduct could have caused was the instillment of a general attitude of fear and hostility in the witnesses." (Infra, Appendix A pg. 42). The prejudice caused by the mailing was far more extensive and damaging to the petitioners than the "general attitude of fear and hostility" noted by the court below. The document altered witnesses to the theory of the defense, a defense which implicated many of the witnesses who received the mailing in the crimes for which the petitioners were charged. The document had its intended effect of substantially

diffusing the petitioners' defense.

The court below further concluded that, "the trial courts lecture was more than sufficient to correct any improper attitudes before the witnesses took the stand." (Infra, App. A pg 42) However, the court overlooks the fact that the witnesses had almost four months to study this document and prepare themselves to testify in a fashion consistent with the court's written instructions. The judge's admonition on the day before trial, in light of the extensive opportunities of the witnesses to read the document, was likely insufficient to cure the prejudice.[2]

This Court has not had occasion to address itself to the question of

2. Moreover, it should be noted that the Court's instructions were not given to impartial jurors, but to the very persons whose credibility was in issue.

improper communications of this nature between prosecutors and government witnesses. This case demonstrates that there are compelling reasons why some definitive guidelines should now be drawn by this Court. Efforts to create alliances between prosecutors and their witnesses are common if not increasing occurrences, and both litigants and lower courts urgently need the assistance of this Court in understanding the boundaries of this type of communication. Even if this Court should determine that there were no constitutional violations in this case, petitioners respectfully request that this Court invoke its supervisory jurisdiction and delineate guidelines with respect to the issue of communications between the government and its witnesses.

2. AN INSTRUCTION TO THE JURY WITH REGARD TO CONSCIOUS AVOIDANCE OF KNOWLEDGE IS SO PREJUDICIAL AS TO CONSTITUTE REVERSIBLE ERROR WHERE (A) IT FAILS TO ADDRESS THE AWARENESS OF A HIGH PROBABILITY THAT THE ACTS CHARGED EXIST; AND, (B) IT FAILS TO ADDRESS AN ACTUAL BELIEF IN THE TRUTH OF HE ACTS CHARGED.

The petitioners were convicted of (1) conspiring to defraud the United States in violation of 18 U.S.C., s.371, of (2) willfully causing false claims to be made against the United States in violation of 18 U.S.C., ss.2, 28, and of (3) knowingly and willfully making and using false documents in violation of 18 U.S.C., ss.2, 1001.

Willful blindness instructions have been approved in prosecutions under criminal statutes prohibiting "knowing" conduct by this Court. Leary v. United States, 395 U.S. 6 (1969).

Section 2.02(7) of the Model Penal

Code provides:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

In Leary v. United States, 395 U.S. 6, (1969) and in Barnes v. United States, 412 U.S. 837, 845 & n.10 (1973), this Court adopted the Model Penal Code definition in determining the meaning of "knowing." In United States v. Bright, 517 F.2d 584, 586-588 (2nd Cir. 1975), the Second Circuit reversed a conviction because the trial court refused to add to a "deliberate ignorance" instruction the qualification "unless he actually believes it did not exist," found in the Model Penal Code s.2.02(7). Further, the

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3. S. 2.02(7) Article 2 of the American Law Institute Proposed Official Draft of the Model Penal Code (May 4, 1962) ("Model Penal Code").

Ninth Circiut established in United States v. Jewell, 532 F.2d 607, 704 n.21 (9th Cir. 1976), the requirement of the Model Penal Code definition of knowledge in the willful blindness instruction.

There was no reason to reach a different result under the statute involved in this case. In so doing, the First Circuit put itself in direct conflict with the Court of Appeals of several circuits.[4] The decision below has the effect of punishing some individuals for conduct for which others would go free.

The most the First Circuit would say in deference to the position of other circuits was that, "although such language may indeed provide useful clarification,

4. United States v. Jolly, 493 F.2d 672 (2d Cir. 1974); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); United States v. Moser, 509 F.2d 1089 (7th Cir. 1975).

the defendants did not ask for it to be included, and the failure to use it is not plain error." [5] (Infra, App. A p. 40). In United States v. Squires, 440 F.2d 859, 862 (2nd Cir. 1971), the Second Circuit found plain error in the failure to include the balancing language on willful blindness, "although technically it would have been more appropriate for the defense to have made a specific reservation of the issue..."

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5. Subsequent to the instruction, trial counsel stated in his objection as follows:

> "Secondly, your honor, as far as the court's instruction regarding willful blindness I object to that, and I would ask the court to instruct the jury not to consider the willful blindness, that it is not consistent with the governments theory that it was a deliberate thing."

Thus, petitioners contend that there was no waiver of the claim of error for the defense had clearly objected to any instruction inconsistent with the governments theory of deliberateness.

Further, in United States v. Jewell, 532 F.2d 704 n.21 (9th Cir. 1976), the Ninth Circuit, at the very least, implied that a substantial deficiency in the instructions would constitute plain error.[6]

Thus, despite the First Circuits application of the plain error standard to the petitioners, this case is still squarely at odds with the decisions of this Court and other circuit courts of appeal. United States v. Jewell, supra, United States v. Aquires, 440 F.2d 859 (2d Cir. 1971). These conflicts justify the grant of certiorari to review the judgment below.

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6. In Jewell, supra, the court's instruction included the statement that, "the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen." (n.11, emphasis supplied) Language to this effect was absent in the instant case, where the deficiencies in the instruction were substantial.

3. THE PETITIONER, EDWARD A. CINCOTTA'S PERVASIVE INVOLVEMENT IN THE LAWFUL OPERATIONS OF MYSTIC WAS SUFFICIENT TO PERMIT A RATIONAL TRIER OF FACT TO FIND, BEYOND A REASONABLE DOUBT, THAT HE KNEW OF AND ENCOURAGED THE CONSPIRACY ALLEGEDLY INVOLVING MYSTIC AND OTHERS.

Petitioner contends that the trial judge erroneously denied his motion for a judgment of acquittal at the close of the government's case as the evidence presented at trial, evaluated in the light most favorable to the government, was not sufficient to permit the jury to find that each element of the offense was proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); In Re Winship, 397 U.S. 358 (1970); United States v. Patterson, 644 F.2d 890, 893 (1st Cir. 1981). "[A] conviction [for conspiracy] cannot be sustained unless the government

*A. refers to Appendix to appellate brief

establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute." United States v. Previte, 648 F.2d 73, 82 (1st Cir. 1981), quoting United States v. Mora, 598 F.2d 682, 683 (1st Cir. 1979). The substantive statutes involved here are 18 U.S.C. ss.287 and 2 (false claims) and 18 U.S.C. ss.1001 and 2 (false statements). With respect to the false claims offense, the indictment charged that the petitioners "willfully caused to be made, and caused to be presented to Fort Devens...a claim...for payment for delivery of number four fuel oil...knowing said claim to be false in that [he] directed truck drivers employed by Mystic Fuel to pick up number four fuel oil [at Union], on the Fort Devens account,...[and] to deliver said fuel oil to its own

customers rather than to Fort Devens." (A. 21-22). As for the false statements offense, the indictment charged that the respondents "willfully and knowingly made and caused to be made false... statements...in that [he] brought and presented, and caused to be brought and presented, to Fort Devens Union Petroleum fuel tickets purporting to represent the delivery of number four fuel oil to Fort Devens, and obtained and caused to be obtained thereon signatures of authorized Fort Devens employees on said fuel tickets, knowing full well that the deliveries represented on said tickets had not been made to Fort Devens." (A. 23).

In his opening statement, the prosecutor told the jury that the evidence would show that the respondents directed Mystic drivers to pick up

number four fuel oil at Union on the Fort Devens account and deliver it instead to customers of Mystic. (A. 139-140, 142). However, the evidence fell far short of the government's expectations.

The Court of Appeals summarized the evidence as follows:

"Although there was no 'smoking gun' that directly demonstrated Cincotta's sponsorship of the fraudulent conspiracy, there was ample circumstantial evidence. The principal source of that evidence was Elaine Kelly, Cincotta's secretary at Mystic. Mrs. Kelly testified that all major decisions at Mystic were made by either Cincotta or Zero. She testified furhter that 'John Zero and Eddie Cincotta talked over everything that was going on...[W]ho eventually made the final

decision I don't know. I would think it would be a mutual thing, or maybe one or the other had a better decision than the other.' She also testified that Cincotta 'made all the rules...for the truck drivers, during the course of the day.' Although Zero normally gave the drivers their instructions regarding deliveries to Fort Devens, Cincotta gave them their instructions in Zero's absence. And although Zero and Cincotta mutually handled all company firing decisions, Cincotta alone signed the corporation's checks, contracts, and bids. Finally, the extent of Cincotta's interest in Mystic's activities is magnified by the fact that his mother and two uncles worked with him in the small company office.

In addition to Mrs. Kelly's testimony there was corroboration in

regard to the Fort Devens fraud in the testimony of other witnesses. Frederick Taubert, the Vice President of Marketing at Union Petroleum, testified that he dealt with either Zero or Cincotta on any issues involving the Fort Devens contract, and that he perceived Cincotta to be in charge of the whole operation of Mystic on a day-to-day basis. Patricia Phelan, the supply clerk and ordering officer at Fort Devens, testified that Zero and Cincotta usually came in together twice a week to have her sign the fuel tickets acknowledging delivery of fuel shipments to Fort Devens. She testified further that on those occasions when another Mystic employee brought in the fuel tickets for her signature, if the tickets did not show to what building the oil had allegedly been delivered she would call

up Zero or Cincotta and they would give her a building number to fill in. And several truck drivers, including Anthony Carpenter and Brian Esterbrook, referred to the due collectively, as 'John or Eddie', 'Zero or Cincotta', in describing the source of their delivery instructions.

As the First Circuit said in Reiss v. United States, 324 F.2d 680, 683 (1st Cir. 1963), "nothing of this, singly or collectively, reflects unfavorably upon the defendant." The evidence does no more than show presumptively innocent actions by the defendant. The subcontract with Union to haul the number four fuel oil to Fort Devens for fiscal 1978 was only a small part of Mystic's business. John Zero was the company dispatcher (A. 270). There was evidence that in John Zero's absence,

the defendant would instruct the drivers as to where to pick up and deliver the oil (A. 271). Seven of Mystic's drivers were called as witnesses by the government. Yet not one driver testified that the defendant had instructed him to pick up oil under the Fort Devens account at Union and deliver it elsewhere. Nor was there any evidence that the defendant was aware that anyone else may have been doing so. There was no evidence that anyone at Fort Devens, or at Union for that matter, ever told the defendant (or anyone else at Mystic) that there was a problem with respect to deliveries of fuel oil to Fort Devens.

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7. John Glencross (A. 605-806); Neal Gooch (A. 519-604); Vincent DiPaola (A. 807-876); Robert Salvato (A. 898-904); Robert Quandt (A. 891-897); Anthony Carpenter (A. 876-891); Brian Esterbrook (A. 1031-1066).

Even though there may have been evidence of a conspiracy, there was no evidence that the defendant was aware of it, much less a part of it. Based upon the evidence presented at trial, any inference to the contrary would be nothing more than impermissible conjecture and surmise. The government must introduce some evidence to link the defendant to the alleged criminal activity. "A defendant, we must remember, is presumed innocent and bears no burden of justifying otherwise legal activity." United States v. Mora, 598 F.2d 682, 684 (1st Cir. 1979). Accordingly, the trial judge erred in denying the petitioners' motion for judgment of acquittal at the close of the government's case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 81-1141
81-1408

UNITED STATES OF AMERICA,
APPELLEE,
v.
EDWARD A. CINCOTTA,
DEFENDANT, APPELLANT.

Nos. 81-1147
81-1409

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOHN ZERO,
DEFENDANT, APPELLANT.

Nos. 81-1155
81-1407

UNITED STATES OF AMERICA,
APPELLEE,
v.
MYSTIC FUEL, INC.,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. J. ARTHUR GARRITY, JR., *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
PHILLIPS, *Senior Circuit Judge*,*
CAMPBELL, *Circuit Judge*.

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* Of the Sixth Circuit, sitting by designation.

Harvey R. Peters, with whom *Paul T. Smith*, and *Jeffrey M. Smith* were on brief, for appellant Edward A. Cincotta.

Joseph J. Balliro, with whom *Juliane Balliro* was on brief, for appellant John Zero.

Richard M. Passalacqua, with whom *Franklin, Pearlstein & Passalacqua* was on brief, for appellant Mystic Fuel, Inc.

Bruce A. Singal, Assistant United States Attorney, with whom *William F. Weld*, United States Attorney, was on brief, for appellee.

August 4, 1982

COFFIN, *Chief Judge*. This criminal appeal challenges the trial court's disposition of five issues, pertaining to the sufficiency of the evidence against one individual defendant, the sufficiency of the evidence and indictment against the corporate defendant, and, involving both individual defendants, the adequacy of remedies for prosecutorial misconduct, the admissibility of a hearsay document, and the propriety of a jury instruction on the implications of a defendant's conscious avoidance of knowledge.

Factual Background

Appellant Mystic Fuel Corporation (Mystic) was engaged in the business of delivering heating oil to oil consumers. It did not own or rent oil storage tanks, but it did own several trucks for transporting oil. It used those trucks to earn money in two different ways: it entered delivery contracts whereby oil suppliers without trucks would pay Mystic a commission to deliver oil to the suppliers' customers; and it entered supply contracts whereby oil consumers would buy oil directly from Mystic, which Mystic would then acquire in its own name from suppliers.

Appellant Cincotta was a major stockholder in Mystic, and its Treasurer. He signed all the company's checks, bids, and contracts. Together with appellant Zero, he made all the ma-

jor decisions of the company, as well as the rules governing its daily operation.

Appellant Zero was also a major stockholder in Mystic, and its dispatcher. He hired the truck drivers, and issued their daily orders on where to pick up and deliver oil. He also supervised Mystic's billing and accounting.

At trial, the government set forth evidence of a scheme through which Mystic would defraud the United States Department of Defense, inducing it to pay for oil that Mystic would sell in its own name to its own clients. The evidence suggested that during fiscal year 1978 (September 1, 1977, through August 31, 1978) Mystic had a delivery contract giving it a commission for delivering "number four oil" (a moderately heavy oil, generally used to heat small industrial buildings, schools, and medium-sized apartment buildings) from the Union Petroleum Corporation (Union) to Fort Devens in Ayer, Massachusetts. The evidence suggested further that on numerous occasions Mystic picked up a shipment of oil at Union, representing that the oil was for delivery to Fort Devens. Then, Mystic would sell the shipment to its own consumer clients. Finally, it would tell the Fort Devens authorities that it had in fact delivered the shipment to Fort Devens, inducing the Department of Defense to pay Union for the shipment. The net result was that Fort Devens paid for shipments it never received, and Mystic was able to sell oil that it had never paid for.

After a two-week trial, the jury deliberated for ten hours and then found all three defendants guilty of (1) conspiring to defraud the United States in violation of 18 U.S.C. § 371, of (2) wilfully causing seven specific false claims to be made against the United States, in violation of 18 U.S.C. §§ 2, 287, and of (3) knowingly and wilfully making and using seven specific false documents in relation to a matter within the jurisdiction of a United States department, in violation of 18 U.S.C. §§ 2, 1001.

Sufficiency of the Evidence Against Cincotta

Appellant Cincotta contends that the trial judge erred in denying his motion for a judgment of acquittal at the close of the government's case. He argues that the evidence was not sufficient to permit the jury to conclude beyond a reasonable doubt that he personally violated the statutes under which he was convicted. Although he does not contest the sufficiency of the evidence establishing a conspiracy to present false claims, he does contest the sufficiency of the evidence that he was a part of the conspiracy.

Our review of the trial judge's decision on this point is quite limited. We are required to affirm that decision unless the evidence, viewed in the light most favorable to the government, could not have persuaded any rational trier of fact that Cincotta was guilty beyond a reasonable doubt. Moreover, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' " *Glasser* v. *United States*, 315 U.S. 60, 80 (1942) (citation omitted).

Given this standard of review, we cannot reverse the trial judge's decision. Although there was no "smoking gun" that directly demonstrated Cincotta's sponsorship of the fraudulent conspiracy, there was ample circumstantial evidence. The principal source of that evidence was Elaine Kelly, Cincotta's secretary at Mystic. Mrs. Kelly testified that all major decisions at Mystic were made by either Cincotta or Zero. She testified further that "John Zero and Eddie Cincotta talked over everything that was going on . . . [W]ho eventually made the final decision I don't know. I would think it would be a mutual thing, or maybe one or the other had a better decision than the other." She also testified that Cincotta "made all the rules . . . for the truck drivers, during the course of the day." Although Zero normally gave the drivers their instructions regarding deliveries to Fort Devens,

Cincotta gave them their instructions in Zero's absence. And although Zero and Cincotta mutually handled all company firing decisions, Cincotta alone signed the corporation's checks, contracts, and bids. Finally, the extent of Cincotta's interest in Mystic's activities is magnified by the fact that his mother and two uncles worked with him in the small company office.

In addition to Mrs. Kelly's testimony there was corroboration in regard to the Fort Devens fraud in the testimony of other witnesses. Frederick Taubert, the Vice President of Marketing at Union Petroleum, testified that he dealt with either Zero or Cincotta on any issues involving the Fort Devens contract, and that he perceived Cincotta to be in charge of the whole operation of Mystic on a day-to-day basis. Patricia Phelan, the supply clerk and ordering officer at Fort Devens, testified that Zero and Cincotta usually came in together twice a week to have her sign the fuel tickets acknowledging delivery of fuel shipments to Fort Devens. She testified further that on those occasions when another Mystic employee brought in the fuel tickets for her signature, if the tickets did not show to what building the oil had allegedly been delivered she would call up Zero or Cincotta and they would give her a building number to fill in. And several truck drivers, including Anthony Carpenter and Brian Esterbrook, referred to the duo collectively, as "John or Eddie", "Zero or Cincotta", in describing the source of their delivery instructions.

In sum, there was sufficient evidence of Cincotta's pervasive involvement in Mystic's operations — both generally and with regard to the Fort Devens deliveries in particular — for a reasonable juror to infer that Cincotta knew of, profited from, and encouraged the conspiracy and each of the individual fraudulent acts that underlay the substantive counts for which he was convicted.

Sufficiency of the Evidence and Adequacy Of the Indictment Against Mystic Fuel

A corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior. But criminal liability may be imposed on the corporation only where the agent is acting within the scope of employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated — at least in part — by an intent to benefit the corporation. *United States* v. *DeMauro*, 581 F.2d 50, 54 n.3 (2d Cir. 1978); *United States* v. *Beusch*, 596 F.2d 871, 878 & n.7 (9th Cir. 1979). Thus, where intent is an element of a crime (as it is here), a corporation may not be held strictly accountable for acts that could not benefit the stockholders, such as acts of corporate officers that are performed in exchange for bribes paid to the officers personally.

Mystic argues that the trial court erred in denying its motion for acquittal. It contends that the government failed to produce evidence of Cincotta's and/or Zero's intent to benefit the corporation through their scheme to defraud the United States. This argument may be rejected out of hand. The mechanism by which the fraudulent scheme worked required money to pass through Mystic's treasury. When Fort Devens paid Union for the undelivered shipments, the shipments were not resold in Zero's name or Cincotta's name. Rather, they were sold to Mystic's customers in Mystic's name. Mystic — not the individual defendants — was making money by selling oil that it had not paid for.

Mystic also argues that, even if there was adequate proof against it at trial, the indictment was fatally defective because it failed to aver that the individual defendants intended to benefit the corporation through their scheme. It is well settled that an indictment must charge all of the essential elements of the crime in question. *E.g.*, *United States* v. *Barbato*, 471 F.2d 918 (1st Cir. 1973). But, to be sufficient,

"these elements need not always be set forth *in haec verba*. Indictments 'must be read to include facts which are necessarily implied by the specific allegations made.' " *Id.* at 921 (citation omitted). *See also United States* v. *McLennan*, 672 F.2d 239 (1st Cir. 1982). "It is a cardinal principle of our criminal law that an indictment is sufficient which apprises a defendant of the crime with which he is charged so as to enable him to prepare his defense and to plead judgment of acquittal or conviction as a plea to a subsequent prosecution for the same offense." *Portnoy* v. *United States*, 316 F.2d 486, 488 (1st Cir.), *cert. denied*, 375 U.S. 815 (1963).

We believe the indictment against Mystic was sufficient under that standard. The three crimes charged all require, as an essential element, criminal intent. The indictment specifically alleges that Mystic Fuel had the requisite intent on each count.[1] Mystic emphasizes that, as a corporation, it could only possess the requisite criminal intent if one of its agents intended to benefit the corporation by his wrongful act. It contends that the agents' intent to benefit it is therefore an essential element of the crime and must be alleged specifically. We reject such analysis, for it would stand the principles of *Barbato*, *supra*, and *Portnoy*, *supra*, on their respective heads. It would require an indictment to specifical-

[1] Paragraph 13 of the indictment provides:

"[T]he defendants *MYSTIC FUEL, INC.*, EDWARD A. CINCOTTA and JOHN ZERO *willfully, knowingly* and unlawfully *entered into an agreement* . . . [*t*]*o defraud* the United States by failing to deliver [oil] and . . . *to willfully* cause to be made and presented claims upon or against the United States Department of Defense . . . , *knowing said claims to be false*, fictitious and fraudulent . . . and . . . [*t*]*o knowingly and willfully* make and cause to be made false, fictitious and fraudulent statements and representations, and use and cause to be used false writings and documents, *knowing the same to contain false*, fictitious and fraudulent statements. . . ." (emphasis added)

Similar allegations of Mystic's intent and knowledge are found in the paragraphs of the indictment setting forth the substantive counts, namely paragraphs 17, 19, and 21.

ly allege any facts "which are necessarily implied by the specific allegations made". It would require the indictment against Cincotta and Zero to allege that they were awake at the time of their actions because that is the only way they could have possessed the requisite criminal intent. Such is clearly not the law. The allegations that Mystic knowingly and wilfully (1) conspired, (2) presented the specific false claims listed in the indictment, and (3) made the specific false statements listed in the indictment, were adequate to apprise the corporation of the crime with which it was charged, to enable the corporation to prepare its defense, and to allow the corporation to plead its judgment of conviction here in response to any subsequent prosecution for the same offense.

Other Issues Raised by Appellants

The other issues presented on appeal deserve more limited treatment. Zero and Cincotta both challenge the district court's decision to admit into evidence pages from a notebook kept by John Glencross, a Mystic truck driver during the period of the indictments. Glencross used the notebook to keep track of all his deliveries, since he was paid $25 for each load delivered. The exhibit was a key link in the government's case, since it indicated shipments that Glencross had picked up under the Fort Devens account but delivered to Mystic's commercial customers. The appellants admit that the pages were relevant, but argue that they should have been excluded as hearsay. They argue that the hearsay exception for "records of regularly conducted activity", Fed.R.Evid. 803(6), was inapplicable because "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id.*

The question of trustworthiness was argued extensively before the trial judge, who acknowledged that the effective cross-examination of Glencross, and some errors in the

notebook brought out by that cross-examination, made the notebook "untrustworthy standing alone". Nonetheless, the court concluded that the notebook was "sufficiently reliable to put in evidence" because it was corroborated in many instances (and in all instances relating to deliveries associated with the defendants' convictions) by delivery tickets issued by Mystic and signed by its commercial customers. "The determination of whether a foundation has been laid for application of [Federal Rule of Evidence 803(6)] and whether the circumstances indicate untrustworthiness, is within the discretion of the district court." *United States* v. *Patterson*, 644 F.2d 890 (1st Cir. 1981). We are not persuaded that the trial court abused its discretion in choosing to admit the records.

Zero and Cincotta also challenge the trial court's jury instruction on when "conscious avoidance of knowledge" is adequate to demonstrate criminal intent.[2] They argue that there was no evidentiary predicate for the charge. We disagree. There was sufficient evidence that a reasonable juror could have concluded that Cincotta, in bringing delivery tickets to Fort Devens for signature, consciously chose not to

[2] Appellant Cincotta contends that the instruction unfairly surprised him because it was not discussed until after the close of evidence, leaving him no opportunity to develop evidence "through cross-examination or otherwise" that he had not closed his eyes to facts which should have prompted him to investigate. We detect no such prejudice. The conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question. Thus, if someone refuses to investigate an issue that cries out for investigation, we may presume that he already "knows" the answer an investigation would reveal, whether or not he is "certain". *See generally United States* v. *Jewell*, 532 F.2d 697, 699-704 (9th Cir. 1976). Evidence of conscious avoidance is merely circumstantial evidence of knowledge; a defendant who seeks to refute such evidence follows the same course no matter how the evidence is labeled. In short, a defendant accused of a crime involving knowledge must be prepared to meet both direct and circumstantial evidence, of which "conscious avoidance" is a major subset.

know whether the deliveries had been made, when he had reason to believe that they had not been made. The appellants also argue that the charge was deficient because it did not include "balancing language" instructing the jurors that wilful blindness constitutes knowledge of a fact only where the individual is aware of a high probability that the fact exists and where the individual does not subjectively disbelieve the fact. *See United States* v. *Jewell*, 532 F.2d 697, 704 n.21 (9th Cir. 1976). Although such language may indeed provide useful clarification, the defendants did not ask for it to be included, and the failure to use it is not plain error. *See United States* v. *Ciampaglia*, 628 F.2d 632, 642-43 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980). Appellant Zero argues that the instruction raised an unconstitutional presumption of guilt against him when, in attempting to relate the conscious avoidance charge to the facts of the case, the court said, "There has been a great deal of evidence with respect to what was done by the defendant Mr. Zero, but a relatively small amount of evidence with respect to the defendant Mr. Cincotta." Although we can appreciate appellant's point, we believe the trial court nullified any potential prejudice when, only four sentences later, it continued:

> "Now, giving you that instruction I hope you know does not constitute any comment by the Court on the weight of the evidence. The Court is not suggesting that you find that Mr. Cincotta consciously avoided knowledge here of things that were going on, nor does the Court imply that what Mr. Zero did or did not do is a basis for his being either convicted or acquitted. That is what is meant when it says that you are the exclusive judges of the facts."

Finally, both appellants attack the trial judge's refusal to impose more severe sanctions against the government for mailing a letter and an eight-page document to prospective government witnesses. The trial court found that the letter and document were improper for two reasons: they dis-

couraged the witnesses from speaking to defense counsel, thereby denying the defendants access to them, and they improperly coached the witnesses on how to present their testimony. Specifically, the mailing conveyed the implicit and explicit message that the witnesses were partisans enlisted by the prosecution to help it win its case, that the defense attorneys were adversaries who would assault their integrity, and that the witnesses should avoid embarrassing the prosecution if they could do so and still tell the truth. The trial court sought to remedy this misconduct by instructing the witnesses before trial on their proper roles. The court told the witnesses specifically that the government had acted improperly. It explained in great detail precisely why the government conduct was improper. It then set forth a correct description of the role of witnesses in a criminal trial and admonished the witnesses to keep that proper role in mind.[3] In the case of witnesses who had refused to speak with defense

[3] The district court's efforts in this regard were exemplary. Although anything less than a full transcript inadequately reveals the care and discernment with which it educated the witnesses, a few excerpts can convey the flavor.

All witnesses who had read the Points for Prospective Witnesses were told:

> "[T]his letter of December 16th and its enclosed Points for Prospective Witnesses constituted improper coaching of witnesses for the government by government counsel . . . The [principal error] is that it implies that being called as a witness for the government allies you with the government in the trial of this case. You are not witnesses for the government. You are witnesses for the system[,] the court[,] the jury that will be hearing this case. [The pamphlet] equates credibility with just truthfulness, and it makes it appear that cross-examination of a witness by defense counsel must implicitly be attacking the truthfulness or the character of a witness, and that is just wrong. . . . [Cross-examination] is less often directed to challenging the truthfulness of a witness than it is the other elements of credibility . . . the witness' ability to observe things accurately and to recall things accurately. . . . [The pamphlet states,] 'If you are asked, "Did anything else happen at that time, or was anything else said?"

attorneys, the court specifically admonished them to reconsider their decision.[4]

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you can be sure that you have omitted a fact which you mentioned to the U.S. Attorney or to the government agent previously.' [That statement erroneously] identifies everything that you have said to a government investigator or to a government lawyer as a fact, that is to say, a correct statement, whereas the whole process here of the trial is designed to ascertain what the facts really were [;] you may have been mistaken in something you have stated heretofore in the course of preliminary interviewing . . . . [The pamphlet states,] 'Beware of leading questions containing half-truths, and beware of Yes or No,' the implication again being that the point to cross-examination is to trick you or to confuse you . . . . You are not to beware of the questions that lawyers on either side of the case ask, or, on occasion, the judge may ask a question. Your obligation is to the jury . . . to testify truthfully, candidly, but not as if you were allied or linked to either side of the case. . . . At the end, it is stated incorrectly . . . that 'The length of time other witnesses will take is largely beyond the control of the government, as it depends on the length of cross-examination.' This sentence, like so many other sentences, makes it appear that the government here is solicitous for you and your welfare and your convenience, but other persons connected with the case might not be so solicitous. That just isn't so."

[4] The witnesses who had refused to meet with defense counsel before trial were told:

"[T]here ha[s] been an improper discouraging of access to defense counsel by government agents in this case. . . . [Y]ou witnesses back in September received a letter from the prosecuting attorney [which stated in part]: 'Remember, anything you say to them,' that is, the defense lawyers or investigators, 'can be used to damage your credibility when you testify at trial.' Well, that doesn't present a fair picture of the role of witnesses. . . . There is an implication in those and other statements, in my determination, that witnesses in the case should be identified with the government. . . . 'A criminal trial, like its civil counterpart, is a quest for truth.' . . . 'An accused and his counsel have rights of access to potential witnesses that are no less than their accessibility to the potential prosecutors.' . . . I ask, previous to the trial of this case, . . . that you reconsider [your refusal] in light of the principles that I have read to you. . . . You are not required to discuss the case in advance, but the whole trend and spirit of the criminal law in the last several years is to facilitate that."

The appellants contend that this was an inadequate corrective response. They suggest that the trial court should have dismissed the indictments, prohibited the witnesses from testifying, or at the very least instructed the jury that the witnesses had been improperly coached. We conclude that the court below responded in a thoroughly satisfactory manner. On the question of denial of access to government witnesses, the appellants have not shown any particularized prejudice from the combination of misconduct and trial court remedy. *See United States* v. *Morrison*, 449 U.S. 361 (1981). After the court's curative charge, only three witnesses — all employees of Union Petroleum — refused to meet with the defense; all three continued their refusal after consulting with Union's corporate counsel, and it is far more likely that they were responding to the company's fear of civil liability to the government for undelivered oil than to any residual influence of the government's letter. On the question of improper coaching, we are not persuaded that these defendants were deprived of a fair trial or suffered any impairment of their rights to cross-examination. The only prejudice that the prosecutorial misconduct could have caused was the instillment of a general attitude of fear and hostility in the witnesses. The trial court's lecture was more than sufficient to correct any improper attitudes before the witnesses took the stand. The court also offered to read the complete mailing to the jury and to allow the defendants to cross-examine the witnesses about the mailings. It adequately defused whatever risk of prejudice had been created by the prosecutorial misconduct.

The judgments of conviction are affirmed.

APPENDIX B

United States Department of Justice

UNITED STATES ATTORNEY

JOHN J. W. McCORMACK POST OFFICE & COURTHOUSE
BOSTON, MASSACHUSETTS 02109

September 16, 1980

BAS:ms

John Glencross
27 Andrews Street
Everett, Massachusetts

Re: United States v. Mystic Fuel, Inc.,
Edward A. Cincotta, John Zero
Criminal No. 80-198-G

Dear Mr. Glencross:

This is to notify you that I anticipate calling you as a witness for the government in the above-entitled criminal case. The trial is presently scheduled to begin in federal district court in the McCormack Post Office and Courthouse Building, Post Office Square, Boston, Mass., on October 28, 1980, in Judge Garrity's courtroom (Courtroom No. 5, 12th floor). For the present time you can anticipate being called as a witness sometime during the two week period from October 28th to November 11th, but this is always subject to change.

In the meanwhile, I will be contacting you before that time in order for us to review your testimony in person. I have enclosed a copy of "Points For Prospective Witnesses" which contains important advice for you regarding your impending testimony, and which you should read carefully. As the advice indicates (Item 20), you do not have to discuss the case with anyone. If you do choose to discuss the case if contacted by the defendants or defense counsel, remember that anything you say to them can be used to damage your credibility when you testify at trial. If you are subject to any pressure of any kind from the defendants or anybody connected with them, please let me know immediately.

It is also very important that I be aware of any arrests, criminal convictions, or other charges of wrongdoing or misdeeds which have been made against you. For example, if anyone at Mystic Fuel ever accused you of stealing oil which you were delivering, it is important that you let me know. Let me emphasize the importance of your providing me with any such information so as to avoid unnecessary surprise at trial.

If you have any questions or problems, please feel free to contact me at 223-0277. If you had any plans to be away during the period October 28th to November 11th, please let me know right away. I will be in touch with you shortly.

Very truly yours,

EDWARD F. HARRINGTON
United States Attorney

By:

BRUCE A. SINGAL
Assistant U.S. Attorney

Enclosure

APPENDIX C

POINTS FOR PROSPECTIVE WITNESSES (Second Version)

1. ALWAYS TELL THE TRUTH. As a witness in a federal criminal case it is your absolute duty to tell the truth to the best of your ability. Do that and let the chips fall where they may - what effect the facts may have on the prosecution or the defense is solely the concern of the judge or jury, not of the witness.

2. DON'T VOLUNTEER INFORMATION YOU ARE NOT ASKED. In your living room you can inject comments nobody has asked you to make. In Court you can't. Confine your answers to what you are asked, because information you volunteer may be inadmissible evidence or may be irrelevant to the case. If you are right that the information you might want to volunteer is important, one lawyer or the other will ask you.

3. DO NOT TELL WHAT OTHER PEOPLE SAID OR WHAT YOU THINK UNLESS YOU ARE SPECIFICALLY ASKED TO DO SO. If you are asked what someone said or what you think about something, you can answer the question. But in most cases "hearsay" and opinions are improper in Court. Unless you are specifically asked to tell about a conversation or to give your opinion, assume that every question calls solely for what you actually saw, heard, or did. Above all, don't volunteer hearsay or opinions you are not asked to give.

4. IF YOU SEE A LAWYER STARTING TO STAND UP, WAIT FOR THE OBJECTION. If you see a lawyer for the Government or for the defense starting to get up, he probably wants to object to a question you were asked. He has the right to have the judge rule on the objection before your answer. Don't jump the gun and answer first. If the Judge says "Objection overruled," then you may answer.

5. YOU CANNOT BE ASKED LEADING QUESTIONS ON DIRECT EXAMINATION. As a Government witness, you cannot be asked "leading" questions by the Government on direct examination. A leading question is one which contains a suggested

answer. For example, "Were you able to see the defendant aim a gun at the car?" is leading. Or, "Isn't it a fact that . . ." is a leading question. Since the Government cannot lead you, you have to remember all of the facts pertinent to every question you are asked yourself, without help from the lawyer. Take your time and be sure to answer the question completely. If you are asked "Did anything else happen at that time?" or "Was anything else said" you can be sure you have omitted a fact which you mentioned to the U. S. Attorney or to a Government agent previously. Take your time and think back to what else may have happened which you failed to mention. Do not quickly answer "No" unless you are sure your answer is complete.

6. YOU CAN REFER TO DOCUMENTS IF YOU NEED TO. It is usually more effective if you can testify from memory without looking at anything. But if you need to look at something to refresh your recollection, you can. "May I see a copy of my statement to the FBI, I think that will refresh my recollection on that exact date," or a similar answer is entirely proper for you to say from the stand, on either direct examination by the Government or on cross-examination.

7. DON'T GUESS. If you don't know the answer to a question, just say so. It is wrong to guess if you don't actually know the answer. If you know most of the answer but not all of the details, you can say so. For example, if you are asked, "When did your last see the defendant" and you know the month or year but not the date, don't say "I can't recall", say that you can recall the approximate but not the exact time, and state it to the best of your recollection. But never guess if you have no first hand information.

8. DO NOT ASSUME THAT LONG-PAST EVENTS ARE ALWAYS DIM IN YOUR MEMORY.

Some witnesses will say in answer to a question "That was five years ago and so I can't remember" or "My recollection is poor for what happened that far back."

This is usually wrong and misleading. The importance of an event is usually more important than how long ago it was in determining how well you can remember it. Charts of memory have proven that most forgetting takes place within a very short time after the event. You may remember Pearl Harbor Day in 1941 and may not remember what you had for breakfast two days ago. If what you saw or heard struck you as important or unusual, you can probably remember it clearly even if it was a long time ago. If that is true and if you are asked, say so. If you don't remember something, just say "I don't remember". The chances are that you don't remember it because it didn't strike you as important at the time.

9. NEVER GET ANGRY. Some cross-examiners try to get witnesses angry so that they will make an error that the cross-examiner can dramatize. When you are angry, you are least likely to do your duty as a witness, which is to give truthful answers. If a lawyer tries to anger you, remember that he has a purpose. Your best reply is to remain absolutely calm and answer the questions. Remember that nothing a lawyer says is evidence of anything unless it is answered affirmatively by the witness. Remember that you are a witness and are not on trial in the case, no matter what you may be asked. If questions are too insulting, the Government may object, but it is much better if the witness can remain calm and handle every question without help from the Government. If you have made any mistakes in connection with the case, just admit them and the suspense will be gone from the subject. If you haven't, you should have no problem either.

10. BE SURE YOU UNDERSTAND THE QUESTION. If you don't absolutely understand a question, ask the examiner to explain what he means. This is especially important if the question is vague or contains value-judgment words, such as "Isn't it a fact that the defendant was always open and above-board in his dealings?" A question like

that can cause your answer to be misleading unless you have it clarified as to just what is meant.

11. BEWARE OF COMPOUND QUESTIONS. If you are asked several questions rolled into one, it will usually be impossible to answer accurately unless you break them down. In such a case, you may say, "That contains several aspects, which I'll try to answer one by one." Or, if the questions is too long, you can say, "Can you break that down for me and ask me the questions one at a time."

12. BEWARE OF LEADING QUESTIONS CONTAINING HALF-TRUTHS. Witnesses are frequently asked leading questions suggesting information that is either half true or contains facts not within the witness's knowledge. Such questions frequently sound plausible on their face, and there is a temptation to answer them "Yes" or "No" when that would not be accurate. If a question contains information that partly true and partly false, an explanation is necessary. The explanation should be in your own words. Don't allow a cross-examiner to put words in your mouth. Remember that the judge or jury will draw conclusions from your answers. The lawyer is not there to engage in polite conversations. He is trying to establish facts that he thinks will help his client. It is your duty to see to it that whatever is established by your testimony is "the truth, the whole truth, and nothing but the truth."

13. BEWARE OF YES OR NO. Some witnesses have the notion that all questions should be answered "Yes" or "No." That is frequently untrue. Many questions cannot be answered accurately with "Yes " or "No" because they contain half-truths or ambiguous phrases that can be misinterpreted later if answered "Yes" or "No." These are the questions that call for an explanation and in response to which you should state the facts of what happened in your own words. If the lawyer asks you to answer "Yes or No", you are entitled to tell him that it can't be answered "Yes or No" without the

answer being misleading. If he insists, you can say something like, "If it has to be answered 'Yes or No' I suppose the answer would be 'No..' It should be explained or it is misleading." The Court will not direct you to answer "Yes or No", unless the question permits that kind of answer.

14. "ISN'T IT A FACT" Be careful of questions start "Isn't it a fact that . . ." or "The fact is . . ., isn't it?" These are usually leading questions containing implications that may be only partly true and that require an explanation.

15. YOU MAY BE INTERRUPTED. When you explain an answer, you may often be interrupted by the cross-examiner, who will start the next question. Let him finish and then bring him back to your unfinished answer. "Before I answer that, I want to finish my answer to our last question." This is very important because the cross-examiner may try to stop you when you have answered the rest of the question that explains the first part of the answer. You have to say whether you were finished, because the Government counsel doesn't know if you were through or not.

16. BEWARE OF EXACT DISTANCES AND TIMES. The cross-examiner will frequently suggest to you distances and times of events when your do not recall the actual time or distance. Do not agree with him unless your would independently arrive at the same estimate as he gives. If you make an estimate, be sure to say it's only an estimate.

17. YOU HAVE TALKED WITH GOVERNMENT REPRESENTATIVES. There is no secret about the fact that you have talked with an Assistant U.S. Attorney or with other Government agents. Indeed there is no secret, of course, about anything you know about the case once you are on the stand. You will be under oath to tell whatever you know that you are asked. Some witnesses think there is something improper about talking to the prosecutor before trial and when asked if they talked with anyone will answer "No." The credibility of such a witness is, naturally, entirely destroyed because no lawyer will put a witness

on the stand without talking with him first. Your conversations with Government agents may, however, be the subject of leading questions designed to create a false impression. For example, if you are asked "Did you discuss your testimony?" and say "No" the impression is that you didn't talk with anyone; if you say "Yes" the implication is that you were told what to say. Here as with other leading questions, state the facts in your own words. For example, if it is true you can say "I talked with the Assistant and he asked me questions, and then went over it with me to see if his impression of what I knew was correct. He told me to tell the truth."

18. YOU MAY BE ASKED ABOUT PRIOR STATEMENTS. Under the law, defense counsel may get to see prior statements you may have made to Government agents. One group of questions may be designed to learn whether you made such statements. If you did sign a written statement, or if someone took notice while you were interviewed, there is no secret about that. On the other hand, if you are not sure, do not assume that someone was taking notes. That may lead defense counsel to demand nonexistent notes and could prove embarrassing to the Government. If you are not sure whether notes were taken or whether you signed a statement, you can simply say that you can't recall.

19. DON'T BE UPSET IF THERE ARE SOME INCONSISTENCIES. Anytime a person tells the same story twice, no matter how carefully, there are likely to be at least some inconsistencies. If there is an inconsistency with a prior statement you made, simply tell the best recollection you have of what happened, and if there is an explanation for the inconsistency, give it. Sometimes it can't be your mistake, but the mistake of the one who took your statement. If that is so, simply say that your recollection is that you told him something else, and you believe it's his mistake.

20. YOU DON'T HAVE TO DISCUSS THE CASE WITH ANYONE. It is possible that the defendant, his counsel or someone on his behalf may ask to talk with you about the case. You are entirely free to do that if you want to. But you don't have to. Whether you do or not is entirely up to you. It is not up to the Government to tell you that you should or that you shouldn't discuss the case with the defense. But you should understand that you have no legal obligation to talk with anyone unless you wish to. The only time you are required to answer questions is on the witness stand on direct or cross-examination, and if the defense wants to subpoena you, they can do so and you will have to answer their questions on the stand. That is the only time you are required to talk. If you do discuss the case prior to taking the stand with the defendant or his counsel, remember that you will be asked about any claimed inconsistencies between what you say on the stand and what the defendant or his counsel may believe you told them. You will not have a stenographic transcript to establish what you said or did not say. In the event, of course, that you are subjected to any threats or pressure, you should contact the U.S. Attorney's Office immediately. Should that happen, try to note down exactly what was said to you as soon after the event as you can.

21. REMAIN DIGNIFIED ON THE STAND AT ALL TIMES. As a witness called on behalf of the United States in a federal criminal case, it is your duty to remain dignified on the stand at all times. Do not chew gum or have things which you may have brought with you, other than necessary records, in your hands while testifying. Wear appropriate clothing. In some cases, witnesses have appeared in combat boots to testify in Federal Court. This makes a poor impression on the Court. Never wisecrack in answer to a question or try to make fun of the cross-examiner. He has a right to ask questions and have them answered in a serious manner. Do not answer a question with another question unless it is to ask the cross-examiner to clarify what he is asking. Answers such as "How am I supposed to remember?" or "what would you have done?" are improper.

22. YOU ARE PERFORMING AN IMPORTANT PUBLIC SERVICE. By testifying in a federal criminal trial, you are performing an important service for your country and

fulfilling an important duty as a citizen. Some witnesses look on testifying as an inconvenience. This is wrong, because if we wish to have the benefits of law enforcement we have to do our part to establish the facts. Whether there has been a violation, of course, is for the Court or jury to decide, not for you. Even if your knowledge seems small, it may form a crucial part of a larger mosaic that must be established for the case to be decided properly. You should look on the duty to testify as an opportunity to play a significant part in an important function of Government rather than an absolutely necessary requirement. The length of time other witnesses will take is largely beyond the control of the Government, as it depends on the length of cross-examination.